



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristine, 29 October 2012
Ref. No.:VP318 /12

DECISION ON ADMISSIBILITY AND ADJOURNING

in

Case KO63/12

Request of Alma Lama and 10 other Members of the Assembly of the Republic of Kosovo for constitutional assessment of Articles 37, 38 and 39 of the Criminal Code No. 04/L-82 of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

The Applicants

1. The Applicants are the deputies of the Assembly of Kosovo Alma Lama, Visar Ymeri, Rexhep Selimi, Afrim Kasolli, Albulena Haxhiu, Albana Fetoshi, Albana Gashi, Glauk Konjuca, Albin Kurti, Florin Krasniqi and Afrim Hoti

Subject matter

2. The Referral is on the constitutionality of Articles 37, 38 and 39 of the **Criminal Code No. 04/L-82 of the Republic of Kosovo** (hereinafter referred as “the Criminal Code”) adopted by the Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.
3. More precisely, the Applicants specifically put the following question to the Constitutional Court: *“Do Articles 37, 38 and 39 of the Criminal Coode NO.04-/L-82 of the Republic of Kosovo violate the rights and fundamental freedoms guaranteed by Articles 40 and 41 of the Constitution of the Republic of Kosovo, as well as by Article 10 of the European Convention on Human Rights and its Protocols.”*

Legal Basis

4. The Referral is based on Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter, “the Constitution”), Article 20 and 43 of the Law on the Constitutional Court of the Republic of Kosovo, of 15 January 2009, (No. 03/ L-121), (hereinafter, “Law”), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, “Rules of Procedure”).

Proceedings before the Court

5. On 29 June 2012, the Applicants submitted the Referral to the Constitutional Court.
6. On 4 July 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panels consisting of Judges Robert Carolan (Presiding), Kadri Kryeziu and Enver Hasani.
7. On 11 July 2012, the Secretariat of the Court notified the Referral to the Interested Parties, including Her Excellency Atifete Jahjaga President of the Republic, Mr. Jakup Krasniqi President of the Assembly of the Republic, Mr. Hashim Thaçi Prime Minister of the Government of Kosovo and Mr Kabashi President of the Kosovo Prosecutorial Council.
8. All interested parties were invited to make comments on the Referral, if any, and send them within the period of fifteen days from the date of receipt of the letter of notification. Up to date, the Court has not received any comments from the Interested Parties.
9. On 28 September 2012, the Applicants requested the Court to inform on the status of the case.
10. On 5 October 2012, the Court informed the Applicants that *“the case is under review procedure and very soon you will be informed with the outcome of your Referral”*.
11. On 18 October 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the admissibility of the Referral and on adjournment of decision on merits of the referral.

Summary of facts

12. Pursuant to the Minutes No. P-58 of the Plenary Session of the Assembly of Republic of Kosovo, dated 20 April 2012, the Assembly of Kosovo with 76 votes “pro”, 9 votes

“against” and 1 vote “abstained” adopted the Criminal Code of Kosovo in the second reading.

13. The adopted Criminal Code contained the challenged Articles 37, 38 and 39 that regulate criminal liability for criminal offences committed through media.
14. These provisions read as follows:

**“SPECIAL PROVISIONS ON CRIMINAL LIABILITY FOR CRIMINAL
OFFENSES COMMITTED THROUGH THE MEDIA**

**Article 37
Criminal liability of chief editors, publishers, printers or
manufacturers**

1. The author of the information is criminally liable when a criminal offense has been committed through the publication of information in the newspapers or other type of periodical, radio, television, internet or other means of communication.

2. The responsible chief editor or the person replacing him or her at the time of the publication of information is criminally liable when:

2.1. the author cannot be found or tried before a court of the Republic of Kosovo;

2.2. the publication of the information was made without the knowledge of the author or against his or her will; or

2.3. if during the time of publication of the information, factual and legal impediments existed for the initiation of criminal proceedings against the perpetrator and continue to exist.

3. The chief editor or the person replacing him or her at the time of publication of information is not held criminally liable if for justified reasons he or she was not aware of a circumstance as provided for in paragraph 2 of this Article.

4. The publisher of a newspaper or other type of periodical is criminally liable when the chief editor or the person replacing him or her at the time of the publication of information in the newspaper or other type of periodical is criminally liable in accordance with paragraph 2 of this Article.

5. When the publisher is criminally liable in accordance with paragraph 4 of this Article and it is not possible to punish the publisher due to legal or factual impediments, the person who printed the information is criminally liable if he or she knew that such legal or factual impediments existed.

6. The manufacturer is criminally liable when the chief editor or the person replacing him or her at the time of the publication of information by means of magnetic tape, film, slides, photographs or other video and audio devices intended for the mass media or for presentation to the public or to a large number of persons are criminally liable in accordance with paragraph 2 of this Article.

7. When the publisher, the printer or the manufacturer who is criminally liable pursuant to this Article is a legal person or a public entity, the person responsible for the printing or manufacturing activities is criminally liable.

8. *The persons referred to in this Article are not criminally liable if the publication of information is an accurate report of a session of a public entity or a statement by an official person.*

Article 38 **Protecting sources of information**

1. *A person who takes part as a professional in the publication of information or as a member of an editorial board of the media and his or her assistant are not criminally liable if they refuse to disclose the author of a publication or the sources of information.*

2. *The persons referred to in paragraph 1 of this Article are criminally liable if the court finds that:*

2.1. *the disclosure of information is necessary to prevent an attack that constitutes an imminent threat to life or physical integrity of any person.*

Article 39 **Application of general provisions on criminal liability**

The provisions on the criminal liability of persons referred to in Articles 37 and 38 of this Code are applicable only if those persons are not held criminally liable under general provisions on criminal liability defined in this Code.”

15. According to the website of the President of the Republic, on 4 May 2012, the President of Republic, Her Excellency Atifeta Jahjaga has taken decision to return to the Assembly of Kosovo the adopted Criminal Code. It was stated as follows: *“Based on the powers of the President of the Republic of Kosovo, according to Article 84 item 6 of the Constitution of the Republic of Kosovo, the decision for review of the Criminal Code was made after it was evaluated that Article 37 and Article 38 of the Criminal Code are in complete contradiction with Article 40 and Article 42 of the Constitution of the Republic of Kosovo, which regulate the freedom of expression and the freedom of media as well as with Article 22 item 2 of the Constitution of the Republic of Kosovo, which obliges the fulfillment of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols”.*
16. It can be noted from the Assembly Kosovo Transcripts of 22 June 2012 that review of “the Decision of the President of the Republic of Kosovo to return the Criminal Code” was debated. It can be also noted that the Functional Committee for legislation proposed approval of the proposed amendment to the Criminal Code, in accordance with the Decision of the President to return the adopted Criminal Code.
17. Indeed, the Functional Committee requested “to remove Article 37, 38 and 39 of the Criminal Code” and, pursuant to the Transcript of 22 June 2012, the vote of the Assembly was: “59 votes are for, four are against and 5 abstain”.
18. It is further stated in the Transcript of 22 June 2012, that *“Pursuant to Regulation, it comes out that there were not 61 votes and there was no majority to pass the referral of the President, which has gone through committees. And, based on this, this law is considered promulgated.”*
19. On 5 July 2012, the Assembly held the first reading of the Draft Law on Repeal of Articles 37, 38 and 39 of the Criminal Code. After debate, the Assembly of Kosovo approved the amendments to the of the Criminal Code eliminating the challenged Articles 37, 38 and 39 of the Criminal Code of Kosovo.

20. Consequently, the Assembly tasked Commission for legislation to prepare the draft law and report to the Assembly for the second reading in the period of two months, meaning until 5 September 2012.
21. Meanwhile, on 19 October 2012, the Assembly held the second reading of the Draft Law on Repeal of Articles 37, 38 and 39 of the Criminal Code and adopted the Draft Law.
22. The Criminal Code of Kosovo is supposed to enter into force on 1 January 2013, as it was adopted the by Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.

Applicants' allegation

23. The Applicants allege that, on 22 June 2012, the Assembly of the Republic has adopted Criminal Code of the Republic of Kosovo, which contains Articles 37, 38 and 39 that are in contradiction with 40 and 42 of the Constitution of Kosovo as well as Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").
24. These provisions read as follows:

Article 40 of the Constitution [Freedom of expression]

"1. Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.

2. The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion."

Article 42 of the Constitution [Freedom of Media]

"1. Freedom and pluralism of media is guaranteed.

2. Censorship is forbidden. No one shall prevent the dissemination of information or ideas through media, except if it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.

3. Everyone has the right to correct untrue, incomplete and inaccurate published information, if it violates her/his rights and interests in accordance with the law."

Article 10 of the Convention [Freedom of expression]

1. "Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Arguments of the Applicants

25. With regard to Article 37 of the Criminal Code, the arguments that follow were given by the Applicants.

*“**Firstly**, this Article, which is included in the general provisions in Criminal Code, in its entirety does not specify on what kind of criminal offences can be committed through media, by leaving in this way a big gap for interpretation, so that the journalists would not feel comfortable to exercise their profession, and nor their feel protected after publication of information. This article enables raising of charges against the journalists, editors, chief editors, publishers, and printing houses on different criminal offences.*

***Secondly**, Article 37 does not have determined the issue of criminal sanctioning.*

***Thirdly**, Article 147, item 1,2,3 and 4 of Criminal Code addressed the issue of limitation of freedom of expression of media, respectively addresses the punishment for consummation of criminal offence that has to do with incitement of public dissemination of hatred, division or impatience between national, racial, religious, ethnic groups or other such groups, that live in the Republic of Kosovo. So the Article 37 is unnecessary duplication within the same law.*

***Fourthly**, Article 37, 38 and 39 prevent publication of all information, except those which are positive. For this issue the European Court for Human Rights has worded its stance in decision “Handyside vs Great Britain” as below: Freedom of expression is one of the pillars of democratic society, basis for its development and condition for wellbeing of individual. That cannot include only information perceived positively, or considered not harmful or indifferent, but also such that insult, blur or are concern for the state or for a certain group of society. These are criteria of pluralism, tolerance and transparency without which a democratic society cannot exist.”*

26. With regard to Article 38 of Criminal Code, the arguments that follow were given by the Applicants.

“The item 2.1 of the Article 38 reads that disclosure of information is necessary to prevent that constitutes unavoidable threat against life and bodily integrity. This Article violates Article 40 and 42 of Kosovo Constitution because it does not determine that on what moment the Court can force the journalist to disclose information. In fact there is only one moment where this can happen, when all other ways have been exhausted and it is a necessary step to reach to that information and only in very specific cases.

Confidentiality of source is essential for the work of journalists. In case one court instance would force them to disclose the source, whenever the prosecution and police does not reach these information or source, the freedom of media would be violated seriously and journalists would not be able to fulfil their mission as

watchdog of democratic institutions, since the sources themselves would not believe them as they would feel endangered to be disclosed sooner or later.

After such protection, the sources would refrain informing the media about the issues that have big interest for public. As a result the vital watchdog role that media have would be underestimated and the possibility that media prove accurate and reliable information would be reduced.

This Criminal Code in entirety does not guarantee even the protection of materials with which the journalists work, that often are object of confiscation by the police.

If the European Court on Human Rights has treated the matter of source protection in the case of "Godwin vs Great Britain", the decision reads: The protection of sources from which the journalists obtain information is an important instrument, which gives opportunity to media to play the important role of democratic society watchdog, if the journalists would be forced to disclose information, would have been very difficult for them to reach the facts, and as a result to inform the society on the issues of public importance. The right to freedom of expression protected by Article 10 and the right that derives from it, of transmission and obtaining the information requires that disclosure of the source to happen only in very special circumstances, e.g when this is required for public interest or interest of individual.

As such the Article 38, does not provide sufficient guarantee for protection of journalists' information, sources and journalism materials."

27. Finally, with regard to Article 39 the Applicants gave the following reasoning:

"This Article is in conjunction with Article 37 and 38 in case the Court would conclude the violation of Article 40 and 42 of the Constitution, is dismissed by default."

Admissibility of the Referral

28. The Court first examines whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
29. Article 113.1 of the Constitution states that *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."*
30. Furthermore, Article 113.5 of the Constitution provides that *"Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed."*
31. The Referral was filed with the Court within the eight days following the adoption of the Law by the Assembly.
32. Therefore, the Referral is admissible as the Applicants are authorized party, filed the Referral within the prescribed time limit and thus they have complied with the admissibility requirements and.

Assessment of the Merits of the Referral

33. The Court recalls that the challenged Articles 37, 38 and 30 of the Criminal Code were adopted by the Assembly of Kosovo on 20 April 2012 and promulgated with the decision of the Assembly on 22 June 2012.
34. However, these provisions were subject of further legislative initiative and debate of the Assembly of Kosovo. Indeed, the Assembly of Kosovo, by a majority votes of deputies, approved in the first reading the Draft Amendments of the Criminal Code No. 04/L-82, that stipulates the elimination of Articles 37, 38 and 39 from the adopted Criminal Code.
35. The Rules of Procedure of the Assembly of Kosovo specify the adoption of the laws as follows.

“Article 56 First reading of Draft-Laws

- 1. First Reading of a Draft-Law shall take place no earlier than two working weeks and no later than four working weeks, from the day of its distribution.*
- 2. Before the first reading of the Draft-Law in plenary session, the functional legal committee assigned by the Assembly shall review the Draft-Law in principle. The Committee shall present a report to the Assembly with recommendation for its adoption of non-adoption.*
- 3. First reading of the Draft-Law shall mean its discussion and voting in principle.*
- 4. First reading of the Draft-Law shall commence with its presentation by the sponsor, and shall continue with presentations by the rapporteur of the functional committee, representatives of Parliamentary Groups and Members of the Assembly. A voting in principle shall conclude reading.*
- 5. The sponsor may withdraw the Draft-Law during the process of reading in the Assembly before the beginning of voting in the second reading.*

Article 57 Review of a Draft-Law by Committees

- 1. Following the approval of the Draft-Law in the first reading, the Assembly shall assign for further review the following:
Functional Committee as lead committee and Committees: for Legislation and Judiciary; Budget and Finance; European Integrations; Human Rights; Gender Equality, Missing Persons and Petitions; and Rights and Interests of Communities and Returns, as main committees.*
- 2. In cases when the Draft-Law regulates issues from the scope of two functional committees, the Assembly shall assign one of them as lead committee.*
- 3. Amendments to the Draft-Law may be introduced by a Member of the Assembly, parliamentary group, parliamentary committee, and the government, within two working weeks from the approval in principle. Amendments shall be addressed to the functional - lead committee.*

4. *The proposal for amendment shall contain: reference on the provision of the Draft-Law, accurate formulation of the amendment and reasoning for the proposed amendment.*

5. *Proposals containing amendments with budgetary implications shall be sent to the Budget and Finance Committee who shall give its opinion through a report, within five (5) working days, from the day of its receipt.*

6. *Functional Committee shall present to the Assembly a report with recommendations on the Draft-Law within two months from the first reading.*

7. *In special cases, the Committee may request from the Assembly an extension of the deadline for submission of the report of up to one month.*

8. *Main committees shall present their reports to the functional committee within ten (10) days, from the day of receipt of amendments from the functional legal committee.*

9. *Functional legal committee, once completed the review, shall submit a report with recommendations to the Assembly, as least five (5) working days prior to the second reading in plenary session. The report shall also contain the opinions of main committees, as well as the statement on proposed amendments from the member of the Assembly, Committee, Parliamentary Group or the Government.*

Article 58 **Second reading of Draft-Laws**

1. *Second reading of Draft-Laws shall commence upon the presentation of the report of the functional committee by the rapporteur. Once the report is presented, the right for discussion shall have the representatives of main committees, representatives of parliamentary groups, representatives of the Government and members of the Assembly.*

2. *Second reading of Draft-Law shall continue by a review and voting on the amendments presented by the functional legal committee and on the amendments proposed by other committees, parliamentary groups, the Government and members of the Assembly.*

3. *Amendments shall be reviewed and voted one by one, according to the order they were presented, along with the text of the Draft-Law.*

4. *When two amendments are proposed for the same article of the Draft-Law, which are exclusive to each other, the amendment that receives higher number of votes shall be considered as adopted.*

5. *Following the review and adoption of amendments reflected in the comparative table containing three columns (text of the Draft Law, text of amendments and final text), the text of the Draft Law shall be adopted entirely, including the adopted amendments.*

Article 59 **Third reading of DraftLaws**

1. *In cases when the Draft-Law does not receive the sufficient number of votes for its adoption in the second reading, the Assembly shall, upon the request of the*

sponsor of the Draft-Law, decide to present the Draft-Law together with the adopted amendments.

2. Amendments that were reviewed and rejected in the second reading, or those that are similar with the amendments of the second reading, shall not be proposed for the third reading.

3. The procedure for reviewing of additional amendments and the procedure of reviewing the amended Draft-Law in the third reading shall be in accordance with Article 58 of the present Rules of Procedure.”

36. Consequently, the Court notes that a legislative process is underway in the Assembly in order to eliminate the challenged Articles 37, 38 and 39 of the adopted Criminal Code.
37. The conclusion of that legislative process is relevant and impacts on the subject matter raised by the Applicants in the Referral.
38. At the current stage, even though the very recent progress made, it is not possible to reasonably foresee when that process will be completely finalized.
39. Thus, taking into account the abovementioned date of 1st January 2013, the Court considers that it is too premature to assess and decide the merits of Referral.

FOR THESE REASONS

Pursuant to Article 113.5 of the Constitution, Articles 20, 42 and 43 of the Law and Rule 56 of the Rules of Procedure of the Constitutional Court the Constitutional Court, unanimously:

DECIDES

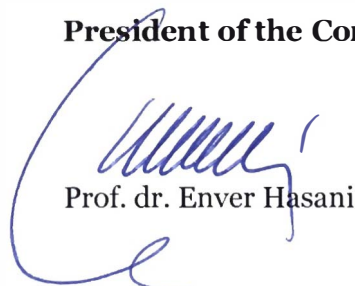
- I. TO DECLARE the Referral as ADMISSIBLE;
- II. TO ADJOURN the decision on merits of the referral until 15 December 2012 and remain seized of the case;
- III. TO REQUEST the Assembly of Kosovo to inform the Court, in fifteen (15) days, about the status of legislative procedure with regard to elimination of Articles 37, 38 and 39 of the Criminal Code No. 04/L-82 of the Republic of Kosovo;
- IV. TO NOTIFY this Decision to the Parties and publish it in the Official Gazette, in accordance with Article 20(4) of the Law; and
- V. TO DECLARE this Decision as immediately effective.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Prof. dr. Enver Hasani